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C O R R E C T E D C O P Y (OMITTED INFO ADDRESSEES)

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TAGS: PLOS, EWWT

SUBJECT: LAW ENFORCEMENT: ASSIMILATED STATELESSNESS, M/V
CAROLINA

1. IN MARCH 3, 1978, MESSAGE, COMMANDANT COAST GUARD
ADVISED STATE DEPARTMENT THAT IT CONSIDERED PROPOSED
SEIZURE OF M/V CAROLINA TO BE LEGALLY PERMISSIBLE UNDER AS-
SIMILATED STATELESSNESS PROVISIONS OF 1958 CONVENTION ON
THE HIGH SEAS (CHS). AS REQUESTED BY COMMANDANT, FOLLOWING
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IS DEPARTMENT'S EVALUATION OF COAST GUARD'S LEGAL ANALYSIS
OF PARA 2, ARTICLE 6 OF CHS.

2. THE COAST GUARD FOCUSES ITS ANALYSIS OF THE CONCEPT OF
ASSIMILATION TO STATELESSNESS, ITS MEANING, AND THE ACTIONS
A STATE MAY TAKE ON THE HIGH SEAS WITH RESPECT TO A VESSEL
ASSIMILATED TO STATELESS ON PARAGRAPH 2 OF ARTICLE 6 OF THE

CHS. IN THE DEPARTMENT'S VIEW, QUESTIONS RELATED TO TREATMENT OF A VESSEL SAILING ON THE HIGH SEAS AS STATELESS CANNOT BE ADDRESSED INDEPENDENTLY OF THE BROADER QUESTION OF THE RIGHT TO APPROACH, VISIT, SEARCH AND SEIZE A FOREIGN VESSEL ON THE HIGH SEAS UNDER INTERNATIONAL LAW.

3. THE FUNDAMENTAL PRINCIPLE OF EXCLUSIVE JURISDICTION OF THE FLAG STATE OVER SHIPS ON THE HIGH SEAS IS SET FORTH IN

ARTICLE 6 (1) OF THE CHS: "SHIPS SHALL SAIL UNDER THE FLAG OF ONE STATE ONLY AND, SAVE IN EXCEPTIONAL CASES EXPRESSLY PROVIDED FOR IN INTERNATIONAL TREATIES OR IN THESE ARTICLES, SHALL BE SUBJECT TO ITS EXCLUSIVE JURISDICTION ON THE HIGH SEAS."

4. LIMITATIONS ON THE EXCLUSIVE JURISDICTION OF THE FLAG-STATE ARE NARROWLY DRAWN AND RELATED PRIMARILY TO CERTAIN SPECIFIED RIGHTS OF WARSHIPS. THESE LIMITATIONS ON THE JURISDICTION OF THE FLAG STATE DERIVE FROM: (1) CUSTOMARY INTERNATIONAL LAW; (2) TREATIES OR OTHER INTERNATIONAL AGREEMENTS IN FORCE BETWEEN THE PARTIES, OTHER THAN THE CHS; OR (3) THE CHS. SUCH PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW AS MAY BE RECOGNIZED ON THIS SUBJECT ARE MORE PROTECTIVE OF FLAG STATE JURISDICTION THAN THE EXCEPTIONS TO THAT JURISDICTION FOUND IN THE CHS. THE UNITED STATES IS PARTY TO NO TREATIES OR OTHER INTERNATIONAL AGREEMENTS
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ESTABLISHING LIMITATIONS ON FLAG STATE JURISDICTION ON THE HIGH SEAS OTHER THAN THE CHS WHICH ADDRESS THE ISSUE OF ASSIMILATION TO STATELESSNESS. ACCORDINGLY, SUCH AUTHORITY AS EXISTS FOR EXCEPTION TO THE PRINCIPLE OF EXCLUSIVE JURISDICTION OF THE FLAG STATE, IF ANY, IS CONTAINED IN THE CHS.

5. FIFTY-SIX STATES ARE PARTIES TO THE CHS. WHILE NOT ALL OF THE PROVISIONS OF THE CHS ARE REFLECTIVE OF CUSTOMARY LAW, ARGUABLY ARTICLES 6 AND 22, WHICH SET FORTH THE ONLY LIMITS ON FLAG STATE JURISDICTION FOUND IN THE CHS, ARE INDICATIVE OF CUSTOMARY INTERNATIONAL LAW.

6. ARTICLE 22 ESTABLISHES THE BASIC RULE GOVERNING THE BOARDING OF A FOREIGN MERCHANT VESSEL ON THE HIGH SEAS. THAT ARTICLE PROVIDES THAT IN THE ABSENCE OF A TREATY CONFERRING POWER ON A WARSHIP TO ENGAGE IN AN "ACT OF INTERFERENCE", A WARSHIP MAY BOARD A FOREIGN MERCHANT SHIP ON THE HIGH SEAS ONLY IF IT HAS REASONABLE GROUND TO SUSPECT (1) THAT THE SHIP IS ENGAGED IN PIRACY, (2) THAT THE SHIP IS INVOLVED IN SLAVE TRADE, OR (3) THAT, ALTHOUGH FLYING A FOREIGN FLAG OR REFUSING TO SHOW ITS FLAG, THE SHIP IS, IN

REALITY, OF THE SAME NATIONALITY AS THE WARSHIP.

7. NONE OF THESE CRITERIA HAS BEEN, OR IS LIKELY TO BE, MET IN THE COURSE OF UNITED STATES OPERATIONS TO INTERDICT NARCOTICS IMPORTATION BY SEA. ADDITIONALLY, IT MUST BE NOTED THAT THE RIGHT OF A WARSHIP TO INTERFERE, UNDER ARTICLE 22, WITH A MERCHANT VESSEL THAT HAS INDICATED A CONFUSED IDENTIFICATION ARISES ONLY IN THE CASE WHERE THERE IS REASON TO SUSPECT THAT THE MERCHANT VESSEL CONCERNED IS OF THE SAME NATIONALITY AS THE WARSHIP. ARTICLE 22 CONFERS

UPON A WARSHIP NEITHER THE RIGHT TO POLICE THE HIGH SEAS FOR THE GENERAL PURPOSE OF ESTABLISHING THE VALIDITY OF EACH AND EVERY VESSEL'S REGISTRY NOR THE RIGHT TO TAKE ANY UNCLASSIFIED

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ACTION IN CASES OF PROVEN FALSIFICATION WHICH DO NOT INVOLVE THE COUNTRY WHOSE FLAG THE WARSHIP FLIES. SITUATIONS INVOLVING A SHIP'S FLYING TWO FLAGS OR OTHERWISE INCONCLUSIVELY IDENTIFYING ITSELF CANNOT BE ANALOGIZED TO SITUATIONS INVOLVING PIRACY OR SLAVE TRADE, AND DO NOT ESTABLISH A RIGHT OF INTERFERENCE PARALLEL TO THAT OF A WARSHIP TO INTERFERE WITH A VESSEL ENGAGED IN PIRACY OR THE SLAVE TRADE.

8. THE ONLY REMAINING RIGHT OF A WARSHIP TO INTERFERE WITH A MERCHANT VESSEL IS FOUND IN ARTICLE 6 (2). THAT PROVISION SETS FORTH A TWO-PRONGED TEST FOR APPLICABILITY OF A TWO-PRONGED CONSEQUENCE. A SHIP WHICH "SAILS UNDER THE FLAGS OF TWO OR MORE STATES", "USING THEM ACCORDING TO CONVENIENCE", "MAY NOT CLAIM ANY OF THE NATIONALITIES IN QUESTION WITH RESPECT TO ANOTHER STATE", AND "MAY BE ASSIMILATED TO A SHIP WITHOUT NATIONALITY."

9. ARTICLE 6(2) REFLECTS THE CUSTOMARY RULE OF INTERNATIONAL LAW THAT ONLY VESSELS HAVING A NATIONALITY ARE ENTITLED TO FREEDOM OF NAVIGATION ON THE HIGH SEAS AND THAT A STATELESS VESSEL MAY BE SUBJECT TO THE JURISDICTION OF ANY STATE WHICH ENCOUNTERS IT.

10. IN CONSIDERING WHETHER A VESSEL IS ASSIMILATED TO STATELESS, THE DEPARTMENT IS WILLING TO APPLY A LIBERAL INTERPRETATION OF THE TWO-PRONG TEST, I.E., IT NEED NOT BE SHOWN THAT THE VESSEL HAS ACTUALLY SAILED UNDER TWO FLAGS, OR THAT IT HAS USED THEM ACCORDING TO CONVENIENCE. IN THE VIEW OF THE DEPARTMENT, GENUINE CONFUSION AS TO THE VESSELS IDENTITY RESULTING FROM A DISCREPANCY BETWEEN THE FLAG, THE STATEMENTS OF THE MASTER, OR MARKINGS ON THE VESSEL, OR A REFUSAL TO IDENTIFY ITSELF ARE SUFFICIENT TO MEET THE UNCLASSIFIED

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THRESHOLD TEST FOR APPLICABILITY OF 6(2).

11. IT MUST BE EMPHASIZED THAT ONCE THE TEST OF APPLICABILITY OF ARTICLE 6(2) IS MET THE APPLICATION OF THE CONSEQUENCE OF ASSIMILATION TO STATELESSNESS IS PERMISSIVE ONLY. A DECISION REGARDING THE APPROPRIATE ACTION TO BE TAKEN WHEN IT IS IMPOSSIBLE TO ASCERTAIN A VESSEL'S IDENTITY OR MORE THAN ONE IDENTITY IS DISPLAYED CAN BE MADE ONLY IN LIGHT OF THE FACTS AND CIRCUMSTANCES INVOLVED IN THE PARTICULAR CASE. IN THIS CONNECTION, THE DEPARTMENT OF STATE WISHES TO NOTE THAT FOREIGN POLICY CONCERNS MAY LEAD TO OUR NONCONCURRENCE IN A COAST GUARD REQUEST TO TREAT A VESSEL AS STATELESS EVEN THOUGH SUCH TREATMENT MIGHT BE

LEGALLY PERMISSIBLE UNDER THE ANALYSIS SET FORTH ABOVE.

12. IT IS ONLY ONCE THE VESSEL HAS BEEN DETERMINED TO BE OR HAS BEEN ASSIMILATED TO A STATELESS VESSEL, AFTER A REASONABLE EFFORT TO VERIFY REGISTRY, THAT THE US MAY BOARD THE VESSEL AND TAKE FURTHER ACTION. IN THIS CASE, SINCE THE VESSEL HAS BEEN DETERMINED TO BE, OR HAS BEEN ASSIMILATED TO A STATELESS VESSEL, ALL FURTHER ACTIONS ONCE ON BOARD ARE PURSUANT TO US LAW. VANCE

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